SHEA & GARDNER
1800 MASSACHUSETTS AVENUE, N.W.
WASHINGTON, D.C. 20036

FRANCIS M. SHEA (1905–1989)
WARNER W. GARDNER
LAWRENCE J. LATTO
RICHARD T. CONWAY
ROBERT T. BASSECHES
BENJAMIN W. BOLEY
RALPH J. MOORE, JR.
MARTIN J. FLYNN
STEPHEN J. POLLAK
DAVID BOOTH BEERS
ANTHONY A. LAPHAM
RICHARD M. SHARP
JOHN D. ALDOCK
WILLIAM S. MOORE
JOHN TOWNSEND RICH
JAMES R. BIEKE
I. MICHAEL GREENBERGER
WILLIAM F. SHEEHAN
R. JAMES WOOLSEY

WILLIAM H. DEMPSEY
OF COUNSEL

FREDERICK C. SCHAFRICK
DAVID B. COOK
FRANKLIN D. KRAMER
WENDY S. WHITE
WILLIAM R. GALEOTA
PATRICK M. HANLON
NANCY C. SHEA
TIMOTHY K. SHUBA
JAMES R. BIRD
MICHAEL S. GIANNOTTO
BRUCE C. SWARTZ+
WILLIAM R. HANLON
ELIZABETH RUNYAN GEISE
COLLETTE C. GOODMAN
JULIE M. EDMOND
LAURA S. WERTHEIMER
THOMAS J. MIKULA
EUGENIA LANGAN

(202) 828-2000
TELEX NO: 89-2399
TELECOPIER: (202) 828-2195

ERIC C. JEFFREY
NANCY B. STONE
CHRISTOPHER E. PALMER
MARK S. RAFFMAN
RUTH L. HENNING
JOHN D. GIBSON
JOHN E. VEILLEUX
ELISE J. RABEKOFF
ELIZABETH M. BROWN
PATRICIA I. HANSEN
JOSEPH F. YENOUSKAS
ALOK AHUJA
ROBERT B. WASSERMAN

BERNICE M. BLAIR
ANNE R. BOWDEN
WILLIAM D. WEINREB
DAVID A. BONO
KENNETH F. SPARKS
LISA A. LANDSMAN
ANTHONY HONG
DAVID J. REICH*
PETER J. SPIRO*
EUGENIE N. BARTON*
LARRY T. GARVIN
AMANDA J. BERLOWE
LAWRENCE A. WEST*
RICHARD A. NAGAREDA

*NOT ADMITTED IN D.C.
+ON LEAVE OF ABSENCE

December 7, 1992

By Hand

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: MM Docket No. 92-258

Dear Sir or Madam:

I am enclosing for filing in the above-captioned docket an original and nine copies of the Joint Comments of the Alliance for Community Media, the Alliance for Communications Democracy, the American Civil Liberties Union and People for the American Way, as well as the Appendix thereto. Please supply each Commissioner with a personal copy of these filings.

Sincerely,

David A. Bono

DAB:md
Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992 Indecent Programming and Other Types of Materials on Cable Access Channels	MM Docket No. 92-258

JOINT COMMENTS OF THE ALLIANCE FOR COMMUNITY MEDIA, THE ALLIANCE FOR COMMUNICATIONS DEMOCRACY, THE AMERICAN CIVIL LIBERTIES UNION AND PEOPLE FOR THE AMERICAN WAY

I. Michael Greenberger
David A. Bono
Shea & Gardner
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

Counsel for the Alliance for Community Media, the Alliance for Communications Democracy, the American Civil Liberties Union and People for the American Way

Of Counsel:

James N. Horwood
Spiegel & McDiarmid
1350 New York Ave., N.W.
Washington, D.C. 20005
(202) 879-4002

Counsel for the Alliance for Community Media and the Alliance for Communications Democracy

Marjorie Heins
American Civil Liberties Union Foundation
Arts Censorship Project
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Counsel for the American Civil Liberties Union

Andrew Jay Schwartzman
Media Access Project
2000 M Street, N.W.
Washington, D.C. 20036
(202) 232-4300

Elliot Mincberg
People for the American Way
2000 M Street, N.W.
Washington, D.C. 20036
(202) 467-4999

Counsel for People for the American Way

Dated: December 7, 1992

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992 Indecent Programming and Other Types of Materials on Cable Access Channels	MM Docket No. 92-258

JOINT COMMENTS OF THE ALLIANCE FOR COMMUNITY MEDIA,
THE ALLIANCE FOR COMMUNICATIONS DEMOCRACY,
THE AMERICAN CIVIL LIBERTIES UNION AND
PEOPLE FOR THE AMERICAN WAY

These comments are being jointly filed by The Alliance for Community Media (formerly the National Federation of Local Cable Programmers), The Alliance for Communications Democracy, The American Civil Liberties Union, and People for the American Way. These four non-profit corporations represent organizations and individuals who use public, educational or governmental ("PEG") and leased access channels either as programmers or as viewers. Their comments are submitted in response to the Notice of Proposed Rulemaking adopted by the Commission on November 5, 1992 and released on November 10, 1992, whereby the Commission proposes to promulgate a rule pursuant to Section 10 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). The Commission's Proposed Rule is contained in Appendix A of its Notice. It would place restrictions on PEG programming that contains "obscene

material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." It would also place restrictions on allegedly "indecent" programming on leased access channels.

BACKGROUND

These commenters fully support the goal that apparently underlies Section 10 and the Commission's Proposed Rule -- the protection of minors from cable programming that their parents find unsuitable for children. However, for a variety of reasons, we cannot support the regulatory mechanism chosen by Congress and the Commission. Before stating our objections, we place Section 10 and the Commission's Proposed Rule in context.

A. The 1984 Act. -- The Cable Communications Policy Act of 1984 ("the 1984 Act") added Title VI to the Communications Act of 1934. As Congress's first direct legislation concerning cable, the 1984 Act was in part concerned with deregulating cable rates, which was thought necessary to encourage prosperity in an emerging industry. See generally H.R. Rep. No. 628, 102d Cong., 2d Sess. 28-29 (1992).

At the same time, Congress was equally concerned with preventing local cable operators from exercising sole programming choice. These operators are often owned by media conglomerates that also have ownership interests in the programmers chosen by their cable subsidiaries. Even when programmer ownership is not an issue, "cable conglomerates have shown themselves to be capable of using their dominant position in electronic media distribution to obtain economic

advantages from those program channels they agree to deliver, and to allow these financial considerations to dictate which particular communication options to offer the public they ostensibly serve." Don R. LeDuc, "Unbundling" the Channels: A Functional Approach to Cable TV Legal Analysis, 41 Fed. Comm. L.J. 1, 8 (1988).

To that end, Congress incorporated into the 1984 Act leased access provisions that require a cable operator to "designate channel capacity for commercial use by persons unaffiliated with the operator." 47 U.S.C. § 532(b)(1). This legislation specified that "[a] cable operator shall not exercise any editorial control over any video programming provided" over leased access channels. 47 U.S.C. § 532(c)(2). According to the legislative history of that Act,

> "A requirement that channels be set aside for third-party commercial access separates editorial control over a limited number of cable channels from the ownership of the cable system itself. Such a requirement is fundamental to the goal of providing subscribers with the diversity of information sources intended by the First Amendment." H.R. Rep. No. 934, 98th Cong., 2d Sess. 31 (1984), reprinted in 1984 U.S.C.C.A.N. 4655, 4668.

Congress was not only worried about financial disincentives. Leased access was also viewed as a way to insure subscribers "programming which represents a social or political viewpoint that a cable operator does not wish to disseminate." Id. at 48, 1984 U.S.C.C.A.N. at 4685.

The 1984 Act also included provisions that allow local franchising authorities to establish PEG access channels. By then, PEG had a long history of having been incorporated by

local authorities into their franchise agreements. The earliest public access channels had appeared in the early 1960's, see Daniel L. Brenner et al., Cable Television and Other Nonbroadcast Video § 6.04[2], at 6-32 (1992), and by 1969 the Commission had issued an Order in part "encouraging" PEG, FCC 69-1170, 20 F.C.C.2d 201, 206-07 (1969). The 1984 Act thus did not create PEG; rather, it ratified the efforts in this area by localities across the country, and it assured other franchising authorities of their ability to require PEG channels in their franchise agreements.

PEG, as is true of leased access, addresses the bottlenecking that occurs when operators impede subscriber access to the full variety of cable programming, whether out of commercial concerns or hostility to diverse programming. Congress therefore specified that "a cable operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity." 47 U.S.C. § 531(e). In doing so, Congress purposefully recognized that PEG was a public forum:

> "Public access channels are often the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas." H.R. Rep. No. 934, supra, at 30, 1984 U.S.C.C.A.N. at 4667.

While thus seeking to assure the greatest diversity of cable programs, the 1984 Act was also concerned with protecting unsupervised children from all types of cable programming -- be it on general or access channels -- that their

parents found unsuitable. Congress therefore enacted a "lockbox" provision, now codified at 47 U.S.C. § 544(d)(2)(A), which requires all cable operators to make lockboxes available to their subscribers. According to the legislative history of the 1984 Act, Congress

> "recognize[d] with respect to cable the need to provide for the restriction, within constitutionally permissible grounds, on the availability of programming, which might not be obscene, but is nonetheless indecent, if children are going to be adequately protected from exposure to such material. Thus, [47 U.S.C. § 544(d)(2)(A)] provides one method for dealing with obscene or indecent programming by requiring every cable operator to provide to any subscriber upon request a device (often referred to as a 'lock box') which is capable of restricting the viewing, during any period selected by the subscriber, of a cable service which contains obscene or indecent programming. The Committee believes that the requirement that these devices be furnished (by sale or lease) by the cable operator provides one means to effectively restrict the availability of such programming, particularly with respect to child viewers, without infringing the First Amendment rights of the cable operator, the cable programmer, or other cable viewers." Id. at 70, 1984 U.S.C.C.A.N. at 4707.

Thus, in 1984, Congress specifically accounted for the first amendment rights of programmers and viewers when it adopted lockboxes as the least restrictive means for effectively protecting children. Pursuant to court order, see ACLU v. FCC, 823 F.2d 1554, 1579 (D.C. Cir. 1987), cert. denied, 485 U.S. 959 (1988), the Commission has subsequently required that lockboxes be capable of blocking all channels carried on a cable system, including PEG and leased access channels. See FCC 87-306, 2 F.C.C.R. 5893, ¶ 9, at 5894 (1987).

B. PEG and Leased Access.[1] -- PEG access channels have by any measure abundantly fulfilled the hope that they would become a robust "electronic marketplace of ideas" in those communities where they are provided for and supported with adequate resources.[2] First, PEG programming is a widely diverse mix from numerous sources. Some 2,000 centers produce about 10,000 hours of local programming a week. Cable Television Regulation (Part 2), 1990: Hearings on H.R. 4415 Before the U.S. House of Representatives Subcomm. on Telecommunications and Finance of the Comm. on Energy and Commerce, 101st Cong., 2d Sess. (1990) (testimony of Sharon Ingraham, on behalf of the National Federation of Local Cable Programmers). An annual video festival known as the Hometown USA Video Festival is dedicated to showcasing the best of local origination and PEG channel productions, and in 1990 it attracted 2,100 entries from 360 cities in 41 states. Patricia Aufderheide, Cable Television and the Public

---

[1] The description that follows is based in very large measure on Patricia Aufderheide, Cable Television and the Public Interest, 42 J. Comm. 52, 58-60 (1992), which is included in the Appendix that is presented with these comments (hereafter, "App.") as Exhibit A. Dr. Aufderheide teaches in the School of Communication at The American University of Washington, D.C., and greatly assisted in the preparation of these comments.

[2] The robust quality of access programming has attracted a great deal of press attention. See App., Exh. B & C (examples of articles). Indeed, cable operators have often touted access channels when trumpeting the public good furthered by their systems. See App., Exh. D-G.

Interest, 42 J. Comm. 52, 58 (1992) [hereinafter Cable Television] (App., Exh. A).

Second, access channels are widely viewed in those communities where they are available. Approximately 30 million homes or 70 million people are provided with an access channel on their cable system. Margie Nicholson, Cable Access: A Community Communications Resource for Nonprofits, Bull. 3 (Benton Found., Washington, D.C.), Apr. 1990, at 7 [hereinafter Cable Access].

> "One multisite study shows that 47% of cable viewers watch community access channels, a quarter of them at least three times in two weeks; 46% say it was "somewhat" to "very" important in deciding to subscribe to or remain with cable. [Frank Jamison, Community Programming Viewership Study Composite Profile (1987) (App., Exh. H).] Another study, commissioned by Access Sacramento, showed that two-thirds of cable subscribers who knew about the channel watched it. [Access Sacramento, 1991 Audience Survey Findings Report (1991) (App., Exh. I).]" Cable Television, supra, at 58.

Similarly, Northwest Community Television found that 50% of subscribers who could receive their programming watched it "frequent[ly]" or "occasional[ly]," and 46% rated this programming "very valuable" or "somewhat valuable." William Morris, Northwest Community Television Subscriber Study (1992) (App., Exh. J).

Finally, PEG programming speaks to a multitude of vital local issues. Government and educational channels may feature such programming as city council and school board meetings, local sports events, religious programming or a videotext community billboard. Cable Television, supra, at 59.

Colleges use access channels not only to teach classes, but also to present more specialized studies, such as an examination of the immigrant experience through oral histories. Diana Agosta et al., The Participate Report: A Case Study of Public Access Cable Television in New York State 45, 53 (1990) (App., Exh. K). Voluntary associations also use public access, including, for instance, the Humane Society in Fayetteville, Arkansas, which promoted its adopt-a-pet program, Cable Access, supra, at 13, and the Animal Rights Kinship of Austin, Texas, which produces the "ARK Forum" on animal and environmental rights, a program that promotes its low cost spay/neuter program, id. at 51. A musical education series is sponsored by the Los Angeles Jazz Society. Id. at 39.

Moreover, PEG access channels are often the forum for core political debate. The Wrightwood Improvement Association of Chicago, for instance, used public access to marshal support for a "home equity" referendum. Id. at 30. In Tampa, Florida, public access cable provided the primary informational vehicle for citizens concerned about a county tax that was defeated in a record voter turnout. Cable Television, supra, at 59. "Also in Tampa, the educational cable access system's airing of school board meetings has resulted in vastly increased public contact with school board members." Id. at 59. In New York City, Paper Tiger television regularly produces programs that are sharply critical of the media. Id. at 60-61.

Austin, Texas, is home of one of access cable's oldest public affairs talk shows. Cable Television, supra, at 60. The League of Women Voters of Bucks County, Pennsylvania produces the ongoing video documentary series, "AT ISSUE." Cable Access, supra, at 57. Public access has also been host to viewpoints as diverse as those of leftist critics of the Gulf War (in Deep Dish TV's national series) and those of conservative Rep. Newt Gingrich (R-GA), who hosted half-hour shows produced by the Washington, DC-based American Citizens' Television (ACTV). Cable Television, supra, at 60-61.

Given the vital role that PEG has assumed, it is not surprising to find that its programming is at times controversial. For example, the Ku Klux Klan has circulated national programs for local viewing. George H. Shapiro, Litigation Concerning Challenges to the Franchise Process, Programming and Access Channel Requirements, and Franchise Fees, in 1 Cable Television Law 1990: Revisiting the Cable Act 341, § III, ¶ F., at 409 (Frank W. Lloyd ed. 1990). In the spirit of robust debate that is appropriate to an open electronic marketplace of ideas, the Klan programs spurred civil liberty and ethnic minority organizations to use the access service in response, which these groups have continued to do. Daniel L. Brenner, supra, § 604[7], at 6-42.2 (1992).

Leased access has not to date been as successful as PEG. Cable operators have exercised their market power to price leased access out of the range of most programmers, as the Senate recognized in the legislative history of the 1992 Act:

> "The cable operator is almost certain to have interests that clash with that of the programmer seeking to use leased access channels. If their interests were similar, the operator would have been more than willing to carry the programmer on regular cable channels. The operator thus has already decided for any number of reasons not to carry the programmer. For example, the operator may believe that the programmer might compete with programming that the [operator] owns or controls. To permit the operator to establish the leased access rate thus makes little sense." S. Rep. No. 92, 102d Cong., 1st Sess. 31 (1991).

Congress thus found that leased access was undermined by the system of operator-established rates that existed from 1984 until passage of the 1992 Act.

C. The 1992 Act. -- During the period of federally mandated rate deregulation ushered in by the 1984 Act, the cable industry experienced tremendous growth. In the seven years following passage of the 1984 Act, cable penetration increased from thirty-seven to sixty-one percent of television households; monthly revenue increased from $18.94 to $31.51 per subscriber; and advertising revenue increased from $600 million to $3 billion. H.R. Rep. No. 628, supra, at 29.

Cable's growth spurred renewed congressional scrutiny of the industry. Since the beginning of October 1989, for example, the Senate Committee on Commerce, Science, and Transportation held eleven hearings on cable television. S. Rep. No. 92, supra, at 3. This oversight culminated in 1992 when Congress overrode a presidential veto and enacted the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Act" or "the Act").

Neither of the bills that originated the 1992 Act contained any provision that even remotely resembles what is now Section 10. Rather, both bills, as well as the hearings and committee reports on each of them, were predominantly concerned with issues related to rate re-regulation, local "must carry" rules, customer service practices, and industry integration and concentration. See S. Rep. No. 92, supra; H.R. Rep. No. 628, supra.

Portions of the original bills did evince a concern for leased access. Thus, what is now Section 9 of the Act strengthens leased access by introducing rate regulation for those channels, under which the Commission must establish maximum reasonable rates and reasonable terms and conditions for carriage. As the legislative history of this provision discloses, rate regulation is expected to "increas[e] certainty and the use of these channels." S. Rep. No. 92, supra, at 32. Similarly, by encouraging the use of leased access by "programming source[s] which devote[] substantially all of [their] programming to coverage of minority viewpoints, or to programming directed at members of minority groups," Section 9(c) of the 1992 Act further "assure[s] that the widest possible diversity of information sources are made available to the public," S. Rep. No. 92, supra, at 29 (citation omitted).

D. Pertinent Amendments in the 1992 Act. -- After both houses held hearings and issued reports concerning the bills that were to become the 1992 Act, those bills were modified by

two amendments directed at controlling the content of cablecasts that were sexually explicit or otherwise deemed to be objectionable. First, both the House and Senate bills were modified by what was to become Section 15 of the Act. 138 Cong. Rec. S589 (daily ed. Jan. 29, 1992); id. at H6528-30 (daily ed. July 23, 1992). This provision is entitled "Notice to Cable Subscribers of Unsolicited Sexually Explicit Programs." It requires a cable operator to notify subscribers at least thirty days before they are provided any "premium channel" -- defined as a pay service that offers movies rated by the Motion Picture Association of America ("MPAA") X, R or NC-17 -- as part of a free promotion. The subscriber may then request that the operator block the transmission of this channel to his home, and the operator must comply.

The legislative history of Section 15 discloses that the provisions of this amendment were purposefully crafted to be similar to the subscriber-initiated lockbox requirement of 47 U.S.C. § 544(d)(2)(A), which the viewer can use to block programs on pre-existing channels. As the Senate sponsor recognized, under Section 15, "[t]he subscriber must call the cable company and ask that the channel be blocked or that the cable company provide a lockout device." 138 Cong. Rec. S589 (daily ed. Jan. 29, 1992) (statement of Sen. Helms).[3/]

[3/] We note that Section 15's system of subscriber-initiated blocking is problematic for a reason unrelated to the concerns of these Comments. Because the MPAA rating system does not provide the safeguards required by the first amendment, Motion Picture Ass'n, v. Specter, 315 F. Supp. 824, 825 (E.D. Pa.

(continued...)

The second such amendment was Section 10. In contrast to Section 15, Section 10 did not arise as an amendment in both houses of Congress. Rather, it was offered in three different parts as floor amendments on the last legislative day before the Senate approved its bill. Senator Helms first proposed subsections (a) and (b) with regard to leased access. Id. at S646 (daily ed. Jan. 30, 1992). Senator Fowler immediately added subsection (c) for PEG. Id. at S649. Some time later, Senator Helms added subsection (d) which abrogates statutory immunity for cable operators if they are found to have carried on PEG or leased access any program that "involves obscene material." Id. at S652. No provisions similar to any of Section 10's four subsections were introduced in the House.

Also in contrast to Section 15, Section 10's provisions are not even remotely analogous to lockboxes or any other system of subscriber-initiated blocking. Rather than relying on subscriber-initiated blocking, Section 10 allows an operator to prohibit even protected speech, without regard to whether subscribers want to see it or not. It therefore differs from a system of subscriber-initiated blocking, which allows parents to decide what (if any) programming to screen from their children.

For leased access, Section 10(a) allows cable operators to prohibit programming that the operator "reasonably

---

3/ (...continued)
1970), government regulations may not rely upon it, Swope v. Lubbers, 560 F. Supp. 1328, 1334 (W.D. Mich. 1983).

believes" is indecent. If the operator does not prohibit such programming on leased access channels, the operator is required by Section 10(b) to place all indecent programs (as defined by the Commission and self-identified by the programmer) on a single channel and to block that channel unless a subscriber requests access in writing. The Commission is required to promulgate leased access regulations within 120 days.

For PEG access, Section 10 follows a different approach. Section 10(c) requires the Commission to promulgate regulations within 180 days that will enable a cable operator to prohibit not just sexually explicit programming, but also "material soliciting or promoting unlawful conduct."

In the case of both PEG and leased access, Section 10(d) abrogates a statutory immunity and allows a cable programmer to be held liable if it carries any program that "involves obscene material." Liability may be imposed whether or not the operator has exercised the authority to prohibit programming given to it under subsections (a) and (c).

In sum, although Section 10 treats PEG and leased access differently, for both types of channels it allows an outright ban on purportedly offensive programming. Rather than directly instituting these bans, however, Section 10 follows a bifurcated approach. First, subsections (a) and (c) allow cable operators to ban the disfavored programming. Second, subsection (d) waives the statutory immunity otherwise avail-

able to those operators if they fail to ban programming that "involves obscene material."

Section 10 and its legislative history are remarkably void of any reference to the lockbox requirement of the 1984 Act, now codified at 47 U.S.C. § 544(d)(2)(4). The congressional record thus contains no legislative findings to support a conclusion that lockboxes have somehow become ineffective in achieving the interest of protecting minors. Rather, the portions of the bill that were enacted as Section 10 were introduced on the floor of the Senate without a committee report on their purpose, justification or likely effect. Even then, no Senator so much as purported to present a considered judgment with respect to how often or to what extent minors were being exposed to cablecasts that their parents considered unsuitable, despite the lockbox requirement.

E. The Commission's Proposed Rule. -- On November 5, 1992, the Commission instituted the instant docket in order to promulgate a rule under Section 10. Appendix A of its Notice of Proposed Rule Making presents the Commission's Proposed Rule, which is intended to implement Section 10. In large measure, the Commission's proposed Rule merely reiterates the provisions of Section 10's first three subsections, but it omits any construction of subsection (d)'s imposition of liability.

The Commission's Proposed Rule is accompanied by a prefatory Notice that generally solicits suggestions for regulations not contained in the Proposed Rule. For example, with

respect to the content-based regulation of PEG, it requests commenters to address "whether our regulations should provide for any additional matters not expressly addressed in the statute," and it "invite[s] interested persons to comment on these and any other aspects that they believe would be germane to proper implementation of this provision." Notice ¶ 14, at 7. See also id. ¶ 12, at 6 (similar language with respect to leased access). It also speaks in general terms about other possible regulations that are not a part of the Proposed Rule.

In contrast to the congressional record, the Commission's Notice does recognize that lockboxes remain an effective means to "control access to other cable services on the system or to limit access to [an unblocked leased access channel] to others in the household." Notice ¶ 9, at 5. It is nonetheless similar to the congressional record in that it, too, is void of either evidence or reason to support a conclusion that lockboxes have somehow become ineffective in achieving the interest of protecting minors from programming that their parents consider unsuitable for children.

SUMMARY

Because the first amendment commands that "Congress shall make no law . . . abridging the freedom of speech," the federal courts have held that the power to regulate "must be so exercised as not, in attaining a permissible end, unduly to infringe on the protected freedom." Cantwell v. Connecticut, 310 U.S. 296, 304 (1940). Section 10 and the Commission's

Proposed Rule violates this basic tenet, as we discuss in detail below.

As an initial matter, Section 10 does not escape first amendment scrutiny merely because the programming standards contained in subsections (a) and (c) are expressed in permissive terms. State action is implicated because this federal legislation impinges on locally-created PEG and leased access public fora. The leased access blocking requirements of subsection (b) also demonstrates direct state action. Additionally, the threat of liability contained in subsection (d) exercises coercive government power over the operator, thereby "convert[ing] its otherwise private conduct into state action." Carlin Communications, Inc. v. Mountain States Tel. & Tel. Co., 827 F.2d 1291, 1295 (9th Cir. 1987), cert. denied, 485 U.S. 1029 (1988).

Even if the prohibitions allowed by Section 10 were not considered state action, they would still be subject to the first amendment, for they impinge on a public forum. Local franchising authorities have, with Congress's approval, "intentionally open[ed] a nontraditional forum for public discourse" and created a public forum for "the free exchange of ideas." International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701, 2706 (1992). Even private restrictions on access channels are therefore subject to first amendment scrutiny.[4/]

[4/] Missouri Knights of the Ku Klux Klan v. Kansas City, Mo., 723 F. Supp. 1347 (W.D. Mo. 1989).

Under appropriate first amendment analysis, Section 10 is itself unconstitutional, for it fails the least restrictive means test. Federal law already requires cable operators to make lockboxes available, 47 U.S.C. § 544(d)(2)(A), and these have been recognized by the courts and the Commission as an effective and non-intrusive means of controlling the access of unsupervised children to programming that their parents find inappropriate.[5/] Content-based restrictions are therefore unconstitutional.[6/]

By largely reiterating the statute, the Commission has failed to propose constitutional regulations under Section 10. First, the Commission's Notice of Proposed Rulemaking is completely devoid of any consideration of less restrictive means. The ban it envisions on all sexually explicit and otherwise assertedly objectionable programming impermissibly reduces adults to viewing only those access programs that are suitable for a child. For that reason, such bans have always failed, even when advanced as a scheme to protect minors from television broadcasts.[7/] Moreover, even if such a ban could

---

[5/] ACLU v. FCC, 823 F.2d 1554, 1579 (D.C. Cir. 1987), cert. denied, 485 U.S. 959 (1988); FCC 87-306, 2 F.C.C.R. 5893, ¶ 9, at 5894 (1987).

[6/] See, e.g., Cruz v. Ferre, 755 F.2d 1415, 1419 (11th Cir. 1985); Community Television v. Roy City, 555 F. Supp. 1164 (D. Utah 1982); Home Box Office, Inc. v. Wilkinson, 531 F. Supp. 987 (D. Utah 1982).

[7/] Action for Children's Television v. FCC, 932 F.2d 1504, 1508-09 (D.C. Cir. 1991), cert. denied, 112 S. Ct. 1281, and cert. denied, 112 S. Ct. 1282 (1992). See generally Butler v. Michigan, 352 U.S. 380, 383 (1957).

be justified, it is unnecessarily restrictive in the case of cable. The Commission has often determined that the far less restrictive option of lockboxes sufficiently guards children from sexually explicit programming, and it has been supported in this determination by Congress and the courts. However, the Notice fails to offer a reason for the Commission's change in position, and no facts are presented on the record to support that change.

Second, because it is woefully underinclusive, the Proposed Rule cannot be justified as necessary to serve a compelling state interest. It mirrors the statute's concern for programming only on PEG and leased access channels, without preventing other sexually explicit or otherwise objectionable cablecasts from reaching the unsupervised children who are assertedly being protected. This is especially suspect because Congress has recognized the existence of other forms of sexually explicit cablecasts, but it has not given the Commission the power to impose similar restrictions on them. In the end, therefore, the Commission is constrained from effectively implementing the goal that purports to justify a content-based restriction on speech. Instead, its Proposed Rule burdens only those who speak on PEG and leased access channels -- society's less powerful interests, including minorities, who otherwise have no access to the electronic media.

Third, even as a child protection measure, the standard for prohibiting PEG programming suffers from overbreadth. It

is not limited to the "patently offensive" sexual material that constitutes indecency, and it prohibits "material soliciting or promoting unlawful conduct." The Commission itself has indicated that this standard must be narrowed, see Notice at 6 n.11, but it has not done so in the Proposed Rule, see id., App. A. In the same vein, the immunity waiver provision of Section 10(d) is overbroad because it subjects cable operators to liability for carrying not only obscene programs, but also those that "involve[]" obscenity. The Commission has similarly failed to use its interpretive powers to narrow this vague statutory provision.

Finally, the Commission has not proposed appropriate procedures for the prior imposition of these content-based restrictions on speech. Although not always invalid per se, content-based prior restraints must be accompanied by a highly protective system of judicial safeguards. Because the provision for imposing liability on cable operators is vague, it, too, should only be imposed after a court has previously found a program obscene. Such procedures are totally absent from the Proposed Rule, however.

The Commission has not exercised its interpretive power to narrowly construe Section 10 to avoid these constitutional deficiencies. Rather, it has at best indicated that such steps would be appropriate without incorporating corresponding regulatory language into the Proposed Rule. See, e.g., Notice at 6 n.11 (suggesting basis for narrowing statutory prohibition standard for PEG access). Indeed, the Commission has

indicated that it intends to incorporate a host of other measures into its Proposed Rule, but it has not delineated the breadth of those measures. See, e.g., id. ¶ 14, at 7 ("Commenters should also address whether our regulations should provide for any additional measures not expressly addressed in the statute."). In any circumstance, this rule-making approach prejudices the public's right to comment on regulatory proposals. It should be especially disfavored in this situation, where core first amendment rights are threatened.

INTERESTS OF COMMENTERS

The Alliance for Community Media, the Alliance for Communications Democracy, the American Civil Liberties Union, and People for the American Way are non-profit corporations that represent organizations and individuals who use PEG and leased access channels both as programmers and as viewers. The comments that they jointly submit therefore reflect the unique shared perspective of organizations whose members have a direct interest in assuring that cable operators use the public rights of way in a manner consistent with the interests of the entire community.

The Alliance for Community Media (formerly the National Federation of Local Cable Programmers) is dedicated to both ensuring that people have access to cable and other electronic media and promoting community uses of such media. It is a national membership organization comprised of more than twelve-hundred organizations and individuals in more than

seven-hundred communities, including volunteer access producers, access center managers and staff members, local cable advisory board members, city cable officials, cable company staff working in community programming, and others interested in local programming around the country. The Alliance for Community Media assists its members in all aspects of community programming over access channels, from production and operations to regulatory oversight.

The Alliance for Communications Democracy supports efforts to protect the rights of the public to speak via cable, and it promotes the availability of the widest possible diversity of information sources and services to the public. The Board of Directors of the organization is composed of representatives of nonprofit access corporations in communities around the country,[8/] who together have helped thousands of members of the public use the access channels that have been established in their communities.

The American Civil Liberties Union ("the ACLU") is a nationwide, nonpartisan organization with nearly 300,000 members, many of whom are viewers of PEG and leased access cable channels. It is dedicated to the protection and promotion of individual rights and liberties, primary among them freedom of speech. In 1990 the ACLU established an Arts Censorship Project specifically to combat an increased climate

---

[8/] These communities include Chicago, Illinois; Montgomery County, Maryland; Boston, Massachusetts; Grand Rapids, Michigan; Manhattan and Staten Island, New York; Columbus, Ohio; Tucson, Arizona; and the State of Hawaii.